PRIVACY AT THE COST OF PUBLIC SAFETY: REEVALUATING MENTAL HEALTH LAWS IN THE WAKE OF THE VIRGINIA TECH SHOOTINGS

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I. INTRODUCTION

In the early morning hours of April 16, 2007, the deadliest school shooting in the history of the United States was set into motion when a student at the Virginia Polytechnic Institute and State University ("Virginia Tech") killed two people at a campus dormitory.[1] The gunman, Seung-Hui Cho, then continued his rampage two hours later in a classroom building where he killed thirty-two more people, injured seventeen others, and finally ended the massacre by committing suicide.[2]

While Virginia Tech is the most recent shooting to grab the country's attention, it unfortunately was not the first.[3] Notably, almost eight years before Virginia Tech, another school shooting shocked the nation when two students at Columbine High School in Colorado killed twelve of their peers, one teacher, and then turned their guns on themselves.[4] One factor that has been cited as contributing to the occurrence of school shootings is the mental health of the perpetrators.[5] Despite this fact, school administrators and counselors walk a fine line when balancing a student's

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[1] Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1.

[2] Robin Wilson, *After Deadly Massacre at Virginia Tech, Students Question University's Response*, CHRON. OF HIGHER EDUC., Apr. 17, 2007, *available at* http://chronicle.com/free/2007/04/2007041701n.htm.

[3] Infoplease.com, A Time Line of Recent Worldwide School Shootings, http://www.infoplease.com/ipa/A0777958.html (last visited Mar. 23, 2008). *See also* Katherine Tweed, *School Violence: Assessing Students' Mental Health*, FOX NEWS, Apr. 17, 2007, http://www.foxnews.com/story/0,2933,266440,00.html (reporting that, "Dr. Marleen Wong, director of Crisis Counseling and Intervention Services for the Los Angeles Unified School District and director of the Trauma Services Adaptation Center for Schools and Communities in Los Angeles, Calif, said that there have been more than 600 completed school shootings since the late 1980s, with hundreds more foiled by vigilant administrators and police officers.").

[4] CNN Columbine Report, Narrative Time Line of the Events, *available at* http://www.cnn.com/SPECIALS/2000/columbine.cd/frameset.exclude.html (last visited March 23, 2008).

[5] *Preventing School Shootings: A Summary of a U.S. Secret Service Safe School Initiative Report*, 248 J. NAT'L INST. JUST. 10, 15 (2002), *available at* http://www.ncjrs.gov/pdffiles1/jr000248c.pdf.

privacy against public safety.[6] When a student confides to a school counselor or is diagnosed with a mental health disorder, that information is considered confidential under various laws and codes of ethics.[7] Schools are thus limited in their ability to disclose a student's medical records, even where there are concerns that the individual could potentially be involved in a violent episode on campus. If Cho's mental health issues had been shared with the administration, the shootings may have been preventable.[8] In the wake of this massacre, federal and state privacy laws must be evaluated and amended to establish standards for determining when a student's mental health becomes a real threat and when protection of the public should override the protection of individual privacy.

This Note examines why school shootings continue to be perpetrated by mentally unstable individuals and what schools and the legislature can do to help prevent such shootings in the future. Section II of this Note provides a detailed account of what happened the day of the Virginia Tech shootings, an overview of Cho's mental health history, and an analysis of how Cho was able to slip through the cracks of the mental health system. Section III provides an overview of both federal and state law affecting privacy in medical records with an in-depth look at Virginia's laws. Section IV offers voluntary procedural changes schools and universities can implement as well as potential legislative changes aimed at reaching a more effective balance between a student's right to privacy and the public's safety. Finally, Section V concludes this Note.

II. THE VIRGINIA TECH SHOOTINGS: WHAT HAPPENED AND WHY?

A. AN ACCOUNT OF THE VIRGINIA TECH SHOOTINGS

The intense media reporting surrounding the Virginia Tech shootings provided detailed coverage of the facts of the tragic event as they came to light.[9] The hard facts came first: thirty-three dead, seventeen more injured, the deadliest school shooting in the nation's history.[10]

The shootings began at 7:15 a.m., when student Seung-Hui Cho entered West Ambler Johnston Hall and proceeded to kill a female student and a male resident assistant.[11] The initial investigation into the two deaths led authorities to believe that it was an isolated incident, perhaps the sad end to a domestic confrontation.[12] Campus police also had reason to believe

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[6] *See* Don Colburn, *Colleges Face Dilemma: Privacy vs. Public Safety*, THE OREGONIAN, Apr. 19, 2007, at A1.
[7] *Id.*
[8] University administrators eventually gained first hand knowledge of Cho's mental health issues after the shootings occurred. *See* Mindy Sink, *Violence Tests the Security on Campuses*, N.Y. TIMES, Sept. 30, 2007, *available at* http://www.nytimes.com/2007/09/30/education/30alert.html?_r=1&oref=slogin.
[9] Wilson, *supra* note 2.
[10] Shapira & Jackman, *supra* note 1.
[11] *Id.*
[12] *Id.*; Wilson, *supra* note 2 (reporting that "the campus police chief defended the university's response, saying that officials handled the situation properly, given that they believed the first shootings were an isolated domestic incident").

that the shooter left the state and, thus, neglected to send out an immediate notification or warning to the student body alerting them to the possibility of a gunman on campus.[13]

More than two hours later at 9:40 a.m., Cho entered Norris Hall, an engineering building approximately half a mile away from the dormitory, and chained the building's doors shut behind him.[14] Cho wore blue jeans, a blue jacket and a vest loaded with ammunition, and was armed with a 9mm semiautomatic and a .22-caliber handgun.[15] Witnesses described the scene that ensued as chaotic, with students jumping out of second story windows to avoid being killed.[16]

Cho first entered room 206 where he fired off approximately twenty shots, killing a teacher and eight students.[17] Next, Cho entered room 207 where a German class was being held.[18] There, Derek O'Dell, a student in the room, said Cho first shot the student next to him followed by the teacher and then opened fire on the remaining students in the class.[19] Cho left the room but would eventually return a second and a third time, only to be thwarted by O'Dell and two other students who were able to barricade the door and prevent Cho from gaining reentry.[20]

Room 211, where a French class was being held, was Cho's third stop.[21] The teacher, Madame Jocelyne Couture-Nowak, and her class had heard the shots from down the hall and attempted to call 9-1-1 and block the door with a desk, but Cho was able to maneuver his way into the room.[22] Once inside, he shot the student trying to call 9-1-1 in the leg but another student, Emily Haas, was able to pick up the phone and keep the line open while pretending to be dead.[23] Professor Liviu Librescu blocked the door to room 204 with his body, and ten students were able to escape through the window before Cho shot Librescu through the door at his fourth stop and was then able to shoot two of the students trying to escape.[24] Police estimate that one hundred and seventy rounds were fired during the nine minutes Cho was in Norris Hall.[25] When the police finally broke through the chained building doors and were close to apprehending Cho, he shot himself.[26]

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[13] REPORT OF THE VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 78–79 (Aug. 2007).
[14] Wilson, *supra* note 2.
[15] Shapira & Jackman, *supra* note 1.
[16] *Id.*
[17] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 27.
[18] Andrea Peyser, *Out of the Horror Emerges a Hero*, N.Y. POST, Apr. 17, 2007, *available at* http://www.nypost.com/seven/04172007/news/columnists/out_of_the_horror_emerges_a_hero_columnists_andrea_peyser.htm?page=0.
[19] *Id.*
[20] *Id.*
[21] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 27.
[22] *Id.*
[23] *Id.* (reporting that in total, three students were able to survive in room 211 by pretending to be dead).
[24] *Id.*
[25] Kristen Gelineau, *5-Minute Delay Crucial in Tech Shooting*, WASH. POST, Apr. 26, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042600292.html.
[26] *Id.*; Shapira & Jackman, *supra* note 1.

After the shootings, many initially wondered why the university had been so slow to react to the murders at the West Ambler Hall.[27] It took campus police more than two hours to notify students of the first shootings that morning.[28] In light of Cho's personal life and mental health history, however, perhaps the focus should have been on why the university did not take actions earlier that could have prevented the shooting altogether.

B. CHO'S MENTAL HEALTH HISTORY AND THE WARNING SIGNS AT VIRGINIA TECH

As facts emerged about the Virginia Tech shooter, it quickly became apparent that Cho was a deeply troubled individual with problems stretching back to early childhood.[29] Cho immigrated to Maryland from Korea with his family at the age of eight.[30] As a young child, he was "shy, frail and leery of physical contact," and by the time he reached the eighth grade Cho was already beginning to show suicidal and homicidal tendencies.[31] During high school, support from his parents, teachers, and mental health counselors helped address Cho's mental health issues, but by his junior year, he refused additional treatment, declaring "there is nothing wrong with me."[32]

It appears that, on the contrary, there was something very wrong with Cho. After attending counseling when his teachers expressed concern, he was diagnosed with social anxiety disorder before starting seventh grade.[33] When the Columbine shootings happened, Cho was in eighth grade and wrote a paper expressing his desire to repeat the attacks.[34] After additional therapy sessions, Cho was diagnosed as having selective mutism, a symptom of "'an anxiety disorder characterized by consistent failure to speak when speech is expected.'"[35] The report noted that individuals with this disorder can exhibit "'passive-aggressive, stubborn and controlling traits,'"[36] but in the past, selective mutism had not been linked with violent behavior and had been successfully treated.[37] Cho was put on antidepressants which helped alleviate his symptoms, but he stopped taking them a year later because his doctor thought he had sufficiently improved.[38]

After being diagnosed with selective mutism, the Fairfax County school system placed Cho in special education at Westfield High School and developed a plan to help him overcome his fears of speaking in

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[27] *See* Wilson, *supra* note 2.
[28] *Id.* (noting that an email message was sent at 9:26 a.m. to alert the student body of the shootings that had taken place at West Ambler Johnston).
[29] *See* Vicki Smith, *Cho's Problems Date to Early Childhood*, USA TODAY, Aug. 30, 2007, *available at* http://www.usatoday.com/news/nation/2007-08-30-3532663914_x.htm?loc+interstitialskip.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Smith, *supra* note 29.
[36] *Id.*
[37] Brigid Schulte & Tim Craig, *Unknown to Va. Tech, Cho Had a Disorder*, WASH. POST, Aug. 27, 2007, at A1.
[38] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 35 (reporting that Cho took 20 mg of the antidepressant Paroxetine from June 1999 to July 2000).

public.[39] Under the program, Cho was excused from speaking in class and making oral presentations.[40] With the help of such accommodations, Cho did well in school, earning A's and B's, and was accepted at Virginia Tech.[41] Due to federal laws which shield students' mental health histories, administrators and teachers at Virginia Tech were never informed of Cho's mental health history.[42] The only way the University could have known about Cho's issues would have been if his parents had voluntarily provided this information or asked for special accommodations. Cho's parents may not have fully grasped the seriousness of Cho's mental disorder or realized that he needed continued help in college.[43]

Cho began classes at Virginia Tech in the fall of 2003 and exhibited relatively few behavioral issues during his freshman and sophomore years.[44] It was the fall of 2005 when Cho first begin exhibiting behavior consistent with deterioration in his mental state and indicating that he could pose a threat to himself and others.[45] Without the structure and support that had helped Cho get through high school, he became more isolated and may have suffered severe ridicule from fellow students at Virginia Tech.[46]

Cho's junior year roommate and suitemates attempted to befriend Cho by inviting him out to parties and to eat with them. However, they eventually ceased their efforts following an incident where Cho repeatedly stabbed the carpet in a female student's room.[47] The suitemates also commented that Cho would call them from different dormitory lounges and ask for "Seung" while identifying himself as "question mark," Cho's name for his imaginary twin brother.[48] At one point, Cho entered a female resident's room and said, "'I'm question mark,'" frightening her enough that she called campus police.[49] Another time, his suitemates found a very large knife in his desk, which they then discarded.[50]

Outside of the dorms, Cho also had problems with his teachers and in his classes. English teacher Dr. Nikki Giovanni contacted the head of the English Department, Dr. Lucinda Roy, to discuss Cho's disruptive behavior and hostile writing in her class.[51] Cho was a distraction in class because he would wear hats, reflective sun glasses, and scarves wrapped around his

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[39] Schulte & Craig, *supra* note 37.
[40] *Id.*; Daniel Golden, *From Disturbed High Schooler to College Killer*, WALL ST. J., Aug. 20, 2007, at B1, *available at* http://online.wsj.com/public/article/SB118756463647202374-Ov_1NZv4xxHzWuURpyNEJzRhdYw_20070918.html.
[41] Golden, *supra* note 40.
[42] *Id.*; Schulte & Craig, *supra* note 37.
[43] Schulte & Craig, *supra* note 37 (reporting that "Cho's mother had sought out members of One Mind Church in Woodbridge to purge him of what the pastor there called the 'demonic power' possessing him").
[44] Smith, *supra* note 29; REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 41.
[45] Smith, *supra* note 29.
[46] Schulte & Craig, *supra* note 37.
[47] *Id.*; REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 42.
[48] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 42.
[49] *Id.* at 45. Cho later told his roommate that he had been text messaging the female and thought it was a game.
[50] *Id.*
[51] *Id.* at 42–43.

head.[52] He also wrote violent papers filled with resentment towards his classmates and was uncooperative when asked to present his work.[53] Dr. Giovanni later learned that many of her students were no longer attending class because they were afraid of Cho.[54] Following this realization, she asked that Cho be removed from her class and even threatened to resign if this was not done.[55]

Cho's conduct was also reported to the Dean, the Judicial Affairs Director, and the University's Care Team. The Care Team is composed of the Dean of Student Affairs, the Director of Residence Life, the Head of Judicial Affairs, Student Health, and legal counsel.[56] After his behavior was reported, the Care Team failed to take any meaningful action, including failing to refer Cho to the University's counseling center.[57] Dr. Roy did schedule a meeting with Cho and noted that "he seemed depressed, lonely, and very troubled."[58] She requested that he go to a counselor on two different occasions, but Cho would not commit to attending any counseling sessions.[59] To resolve the situation with Dr. Giovanni, Dr. Roy offered to privately tutor Cho instead of having him go to class.[60] Only one month later, Dr. Roy reported that Cho's writings all centered on "'shooting or harming people because he's angered by their authority or by their behavior,'" yet, again, no further action was taken.[61]

The first time Cho contacted the counseling center was on November 30, 2005, three days following the incident where the campus police were called after Cho entered the female resident's room and frightened her.[62] Cho was triaged over the phone and scheduled an appointment to meet with a counselor. Cho missed that appointment, but he did call the counseling center a second time and was triaged a second time.[63] A second appointment was not made, and the notes from the two triages mysteriously disappeared from his file.[64]

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[52] *Id.* at 42.
[53] On one occasion, Cho was angry that class time had been spent talking about eating animals instead of poetry, and to express his distaste he wrote, "'I don't know which uncouth, low-life planet you come from but you disgust me. In fact, you all disgust me,'" and then continued with, "'You low-life barbarians make me sick to the stomach that I wanna barf over my new shoes. If you despicable human beings who are all disgraces to [the] human race keep this up, before you know it you will turn into cannibals—eating little babies, your friends. I hope y'all burn in hell for mass murdering and eating all those little animals.'" *Id.*
[54] Students reported that Cho had been using his cell phone to take pictures of them, and when Dr. Giovanni asked one student why attendance was down, she replied, "'It's the boy . . . everyone's afraid of him.'" REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 42–43.
[55] *Id.* at 43.
[56] *Id.*
[57] Virginia Tech's official counseling center is the Cook Counseling Center. *Id.* The Care Team perceived the situation as being resolved and did not discuss Cho's case further. *Id.*
[58] *Id.* at 44.
[59] *Id.* at 44–45.
[60] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 44.
[61] *Id.* at 45.
[62] *Id.* at 45–46.
[63] *Id.* at 46.
[64] The first triage was conducted by licensed professional counselor Maisha Smith and the second triage was conducted by Dr. Cathye Betzel, a licensed clinical psychologist, who was recommended to Cho by Dr. Roy. Neither Smith nor Dr. Betzel can recall the details of their conversation with Cho. *Id.* at 45–46.

The next major insight into Cho's mental state came when he was institutionalized after a second incident involving a female student living in Cho's dormitory.[65] The student reported that Cho had been leaving her strange messages on "Facebook"[66] and on the white dry erase board outside her room.[67] After campus police spoke with Cho and asked him to abstain from contact with the student, he sent an instant message to his suitemate saying, "'I might as well kill myself.'"[68] The suitemate reported the behavior to campus police, who then brought Cho into the station on December 13, 2005, for an evaluation by a licensed clinical social worker.[69] The evaluation established that "Cho was mentally ill, was an imminent danger to self or others, and was not willing to be treated voluntarily," and the social worker recommended a night of involuntary hospitalization.[70] After an uneventful night, an independent evaluator conducted another assessment of Cho in the morning and came to the opposite conclusion: Cho was not an imminent danger to himself or others.[71] Before the scheduled commitment hearing later that day, a psychiatrist evaluated Cho and also determined that Cho was not an imminent danger to himself or others.[72] At that time, recommendations were made that Cho be treated on an outpatient basis and go to therapy, but no medications were prescribed.[73]

The evaluations made the morning after Cho had been institutionalized were based on Cho's own statements about his previous mental health history and no corroborating information was gathered to determine if his statements were truthful.[74] The commitment hearing was attended only by Cho and his attorney, but despite the independent evaluator's findings, the special justice still ruled that Cho "'presents an imminent danger to himself as a result of mental illness'" and required that Cho follow the outpatient treatment recommendations.[75] Cho went to an appointment at the counseling center later that same day and was triaged for a third time, although that report is missing as well.[76] The counseling center's policy is to let patients decide for themselves whether to schedule additional appointments. Cho did not make any follow-up appointments or ever return to the counseling center.[77]

In the following months, Cho continued to write violent stories and have issues with his teachers.[78] One story in particular described a scene

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[65] *Id.* at 46.
[66] Facebook is an online networking site used by numerous individuals to connect with other individuals also signed up for Facebook accounts. Each person's Facebook profile has a "wall" where people that are "friends" on the site can post comments and messages. *See* Facebook, http://www.facebook.com.
[67] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 46 (reporting that this was the same female who's carpet Cho had stabbed on another occasion).
[68] *Id.* at 47.
[69] *Id.*
[70] *Id.*
[71] The independent evaluator, a licensed clinical psychologist, had reviewed the prescreening report, but not any hospital records, and spent approximately fifteen minutes conducting the evaluation. *Id.*
[72] *Id.*
[73] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 47.
[74] *Id.* at 48.
[75] *Id.*
[76] *Id.* at 49.
[77] *Id.*
[78] *Id.* at 49–50.

disturbingly similar to the actual Virginia Tech shootings.[79] In the spring of 2007, Cho began buying the ammunition he would use later that year for his massacre at Virginia Tech.[80]

C. SLIPPING THROUGH THE CRACKS: WHERE THE MENTAL HEALTH SYSTEM AND SCHOOL SYSTEM FAILED CHO

With all of the red flags raised by Cho's behavior, it seems improbable that he was able to attend almost four years of college without receiving serious medical help for his disorder. Somehow, Cho managed to slip through the cracks of the mental health system at Virginia Tech by not receiving any guidance or psychological treatment that may have allowed him to lead a more normal life. Regrettably, the mental health system at Cho's high school may have failed him as well.

When accommodations were made for Cho during high school, there may have been too much emphasis on his academic success and not enough on his emotional disorder.[81] Dewey Cornell, a clinical psychologist and professor of Education at the University of Virginia, suggests that Cho's high school may have wrongly focused on "'[w]hat do we need to do to help him get through school'" instead of getting at his real, underlying problems.[82] While Cho was excused from talking in class and giving oral presentations, it may have been more helpful to provide some type of therapy to help him work through his inner issues. A former music teacher at his high school, Michael Viega, has said that the individualized plan the school implemented for Cho "'had nothing about any kind of inner work for him, any self expression'" and that "'[h]e made the grades, he passed . . . but his soul was as empty as could be.'"[83] Each month, Cho was provided with only fifty minutes of speech and language therapy at Westfield, which according to Lindy Crawford, chairwoman of special education at the University of Colorado at Colorado Springs, "'isn't enough for somebody who isn't speaking and has the ability to[.]'"[84] Westfield did recognize that he had an anxiety disorder and tried to take actions that administrators hoped would help him achieve a state of normalcy.

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[79] "It tells the story of a morning in the life of Bud 'who gets out of bed unusually early . . . puts on his black jeans, a strappy black vest with many pockets, a black hat, a large dark sunglasses [sic] and a flimsy jacket . . . .' At school he observes 'students strut inside smiling, laughing, embracing each other. . . . A few eyes glance at Bud but without the glint of recognition. I hate this! I hate all these frauds! I hate my life. . . . This is it. . . . This is when you damn people die with me . . . .' He enters the nearly empty halls 'and goes to an arbitrary classroom . . . .' Inside '(e)veryone is smiling and laughing as if they're in heaven-on-earth, something magical and enchanting about all the people's intrinsic nature that Bud will never experience.' He breaks away and runs to the bathroom 'I can't do this. . . . I have no moral right. . . .' The story continues by relating that he is approached by a 'gothic girl.' He tells her 'I'm nothing. I'm a loser. I can't do anything. I was going to kill every god damn person in this damn school, swear to god I was, but I . . . couldn't. I just couldn't. Damn it I hate myself!' He and the 'gothic girl' drive to her home in a stolen car. 'If I get stopped by a cop my life will be forever over. A stolen car, two hand guns, and a sawed off shotgun.' At her house, she retrieves 'a .8 caliber automatic rifle and a M16 machine gun.' The story concludes with the line 'You and me. We can fight to claim our deserving throne.'" REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 50.

[80] *Id.* at 52.

[81] *See* Golden, *supra* note 40.

[82] *Id.* at B2.

[83] *Id.*

[84] *Id.* at B3.

Federal and state privacy laws would have prohibited Virginia Tech from receiving Cho's mental health records.[85] While it is acceptable for a college to request a student's high school discipline or criminal record, mental health records are not readily available.[86] Despite the privacy laws in place, universities can ask school guidance counselors for an assessment of how a student relates to their teachers and peers.[87] This process could have alerted Virginia Tech to Cho's potential problems. Conversely, Virginia Tech may have been wary to learn about the mental health problems of an incoming student because of the possible exposure to liability.[88] If a university learns about a student's mental health history or diagnosis and then decides to not accept the student for other reasons, there is a definite prospect that litigation could follow.[89]

Beyond the privacy law issues, the lack of communication amongst Virginia Tech's departments also contributed to Cho slipping through the cracks and not receiving the help he needed.[90] The campus police, Residence Life, and the academic branch of the university all had information concerning Cho's behavior that should have set off alarms, but none of those agencies informed the university's Care Team about their separate concerns and encounters with Cho.[91] Even within the English department, there was little communication between faculty members about the strange behavior Cho exhibited.[92] The Care Team only conducted one review of Cho, and, without having access to all the information known, it was not able to connect the dots and properly assess the severity of the situation.[93] Furthermore, the Care Team was restricted by the federal and state privacy laws which would have made it difficult to find out about Cho's prior mental health history.[94]

Experts suggest that when a cluster of red flag behavior is present in an individual, the risk of danger that particular individual poses becomes more serious. Had the various departments at Virginia Tech communicated properly, they would have realized that Cho was a high risk individual.[95] The red flag behavior Cho displayed included at least the following: violent fantasy content writing, a fascination with weapons, loner behavior, suicidal and homicidal tendencies, stalking, interest in previous shooting situations, victim/martyr self-concept, strangeness and aberrant behavior, previous police contact, and an expressionless face.[96] Based on that cluster

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[85] *See* discussion *infra* Section III.
[86] *See* Golden, *supra* note 40.
[87] *Id.*
[88] *See* Schulte & Craig, *supra* note 37.
[89] *See id.*
[90] *See* REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 52.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *See id.*
[96] The full list of warning signs includes: violent fantasy content (writings, drawings, reading, and viewing materials), anger problems, fascination with weapons and accoutrements, boasting and practicing of fighting and combat proficiency, loner behavior, suicidal tendencies, homicidal ideation, stalking, disciplinary problems, imitation of other murderers, victim/martyr self-concept, strangeness and aberrant behavior, paranoia, violence and cruelty, inappropriate affect, acting out, police contact, mental health history related to dangerousness, expressionless face/anhedonia, unusual interest in

of red flag behavior, the Care Team should have taken immediate action by developing a treatment plan, contacting Cho's parents, and requesting medical records, among other things.[97]

Even though Cho eventually underwent a psychiatric evaluation and was involuntarily hospitalized for a night,[98] there may have been more that mental health service providers could have done to help. Virginia law provides that no person may be kept under temporary detention for more than forty-eight hours before having a commitment hearing, yet mental health professionals believe that the time period should be lengthened.[99] Reasons given for extending the detention period include providing time to contact family and friends as well as to look into the patient's prior mental health history.[100] If the mental health service providers had not been under a strict forty-eight hour deadline, they may have delved deeper into Cho's past and discovered information that would have heightened their concern.

The independent evaluator that conducted Cho's second evaluation the morning after he was hospitalized had no collateral information available to verify what Cho said and, instead, had to rely heavily on the report from the prior evening.[101] The evaluator should have had more time to conduct the evaluation and more information on which to base his findings.[102] While it is not clear how much emphasis the special justice put on the independent evaluator's report, it was one of only three documents reviewed for the commitment hearing.[103] Further, Cho was the only person to testify at his hearing, which should raise concerns considering he was a person who had trouble communicating, yet that type of situation often happens at commitment hearings in Virginia.[104] The combination of time pressures and a lack of information during Cho's hospitalization and commitment hearing may have allowed Cho to pass under the radar once again.

Observing how Cho's peers reacted to his strange behavior should have been another warning sign that Cho posed a serious threat to himself and others.[105] Studies suggest that there is no stereotype or "useful profile of 'the school shooter,'"[106] but in the real world peer groups react to people by

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police, military or terrorist activities, and use of alcohol/drugs. *See* REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at Appendix M.

[97] *See id.* at 52.

[98] *Id.* at 46.

[99] *Id.* at 56 (noting that this is one of the shortest detention periods in the nation).

[100] *Id.*

[101] *Id.* at 56.

[102] *See* REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 57.

[103] *Id.* (noting that the special justice was only able to view the following documents: "the Uniform Pre-Admission Screening Form, a partially completed Proceedings for Certification form recording the findings of the independent evaluator and a physician's examination form containing the findings of the treating psychiatrist").

[104] *Id.*

[105] *See* Benedict Carey, *When the Group Is Wise*, N.Y. TIMES, Apr. 22, 2007, *available at* http://www.nytimes.com/2007/04/22/weekinreview/22carey.html?ref=weekinreview.

[106] *Preventing School Shootings*, *supra* note 5, at 12 (noting that the "personality and social characteristics of the shooters varied substantially" and that "[f]ew had been diagnosed with any mental disorder prior to the [shooting]."). *See also* Saul Levine, *Access to Mental Health Treatment Can Prevent School Shootings*, *in* SCHOOL SHOOTINGS 69, 70–71 (Laura K. Egendorf ed., 2002).

reading things like body language and tone of voice.[107] Students in Dr. Giovanni's English class quickly picked up on the fact that something was awry with Cho when many of them abstained from attending class after he read one of his more violent poems aloud.[108] The peer group "can be seen as a single organism that recoils from a threat, then sends out feelers, in the form of overtures from its members, to gauge whether danger is imminent[,]" and it "absorb[s] most of this information instantly, unconsciously, and often accurately[.]"[109] In Cho's case, several students attempted to converse with him or include him in group activities, but he was unresponsive, and they eventually left him alone.[110] Had more attention been paid to how other students reacted to Cho, administrators at Virginia Tech may have had a chance to help Cho work through his issues.

There were numerous opportunities, beginning when Cho was in high school, for administrators and the mental health care system to intervene and provide him with the assistance he clearly needed. At Virginia Tech, the lack of communication between its various departments led to the Care Team missing the cluster of red flag behavior Cho had been exhibiting. Lack of time and information also contributed to administrators' inability to appreciate the severity of Cho's situation when he was hospitalized. Ultimately, Cho was able to bypass the structure in place at the time, and his subsequent violent behavior has made reevaluating the policies of schools and universities for addressing students with mental health issues, as well as federal and state medical records privacy laws, a necessity.

III. FEDERAL AND STATE MEDICAL RECORDS CONFIDENTIALITY LAWS, PRIVILEGED COMMUNICATIONS AND COMMON LAW LIABILITY

A. FEDERAL PRIVACY LAW

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") is the federal law governing the privacy of medical information and is substantially similar to most state statutes in this area.[111] Privacy in educational records is dealt with primarily through federal law in the Family Educational Rights and Privacy Act of 1974 ("FERPA")[112] and by various regulations issued by the Secretary of Education.[113] FERPA is important for the purposes of this Note because it applies to medical records held by school or university health centers.[114] An overview will be provided for both HIPAA and FERPA; however, most of the analysis will focus on FERPA, because the analysis for state statutes is also applicable to

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[107] *See* Carey, *supra* note 105.
[108] *Id.*
[109] *Id.*
[110] *Id.*; REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 42.
[111] Health Insurance Portability and Accountability Act ("HIPAA") of 1996, 42 U.S.C. §§ 1320d–1320d-8 (2008); *see* 45 C.F.R. §§ 164.500–534 (2000) (the "Privacy Rule" of the HIPAA).
[112] Family Educational Rights and Privacy Act ("FERPA") of 1974, 20 U.S.C. § 1232g (2008).
[113] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 65.
[114] *Id.* at 66.

HIPAA. Further notice that HIPAA and FERPA can serve to pre-empt state laws where those laws offer a lesser degree of privacy protection.[115]

1. *HIPPA*

a. Pre-HIPPA Confidentiality Standards

Prior to the enactment of HIPPA, confidentiality in patient medical information was governed by ethical obligations, general state statutory duties, privilege rules, and the possibility of being held liable for unauthorized disclosures.[116] Even after the enactment of HIPPA, it is important to understand these confidentiality standards and obligations, because many still apply.[117]

Medical professionals are subject to ethical obligations requiring them to maintain confidentiality in the information they acquire from treating a patient.[118] These obligations improve the doctor-patient relationship by allowing patients to feel comfortable disclosing sensitive information that might be necessary for them to receive proper medical care.[119] The Hippocratic Oath[120] embodies this obligation in the most basic sense, but the American Medical Association's Principles of Medical Ethics provides a more updated version of the ethical obligation of confidentiality.[121]

Common law and state statues also impose confidentiality requirements upon health care professionals by creating a cause of action for the wrongful disclosure of private information.[122] Different from the concept of confidentiality, privilege is a rule of evidence that applies only in legal proceedings to protect communications between patients and physicians.[123] By invoking privilege, medical professionals can refuse to reveal information they gained from a patient based on the rationale that

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[115] *Id.* at Appendix H.
[116] *See generally* TREATISE ON HEALTH CARE LAW §16.02 (Robert W. Lundy ed., Matthew Bender 2007) (1991) [hereinafter TREATISE].
[117] *See id.*
[118] *Id.*
[119] *Id.*
[120] The text of the Hippocratic Oath provides in pertinent part: "I swear by Apollo the physician, and Asclepius, and Hygieia and Panacea and all the gods and goddesses as my witnesses, that, according to my ability and judgment, I will keep this Oath and this contract[.] . . . Whatever I see or hear in the lives of my patients, whether in connection with my professional practice or not, which ought not to be spoken of outside, I will keep secret, as considering all such things to be private. So long as I maintain this Oath faithfully and without corruption, may it be granted to me to partake of life fully and the practice of my art, gaining the respect of all men for all time. However, should I transgress this Oath and violate it, may the opposite be my fate." U.S. National Library of Medicine, Greek Medicine: The Hippocratic Oath, http://www.nlm.nih.gov/hmd/greek/greek_oath.html (last visited Mar. 25, 2008).
[121] The American Medical Association's Principles of Medical Ethics provide: "A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law." American Medical Association, Principles of Medical Ethics, http://www.ama-assn.org/ama/pub/category/2512.html (last visited Mar. 25, 2008).
[122] *See* William Prosser & W. Page Keeton, THE LAW OF TORTS (5th ed. 1984); RESTATEMENT (SECOND) TORTS § 652A (1977) [hereinafter RESTATEMENT].
[123] Clinical Lawyer, Confidentiality vs. Privilege: What is the Difference?, http://clinicallawyer.com/files/2007/04/09/confidentiality-vs-privilege-what-is-the-difference/ (last visited Mar. 26, 2008).

disclosure would impair the special relationship shared by physicians and patients.[124]

Improper disclosure of confidential information can lead to liability stemming from two sources: (1) from confidentiality statutes which can provide for both criminal and civil penalties as well as civil causes of action, and (2) from common law theories "including invasion of privacy, breach of confidential relationship, breach of implied contract, defamation, negligence, and the intentional infliction of emotional distress."[125] State statute confidentiality requirements and common law liability are discussed further in Section III.B.

b. Post-HIPAA Confidentiality Standards

HIPAA governs the electronic transmission of medical records.[126] When initially enacted, HIPAA's purpose was defined by five separate objectives,[127] but today it is most widely recognized for its fifth objective: "to simplify the administration of health insurance."[128] In order to meet the fifth objective, administrative simplification provisions ("ASPs") were established to encourage uniformity in the health information system.[129] On the authority of the ASPs, the Department of Human and Health Services developed standards and regulations for the electronic transmission of certain health information,[130] including a rule directed specifically at privacy (the "Privacy Rule").[131]

The Privacy Rule applies to "health care providers," a term which broadly covers doctors, nurses, therapists, counselors, social workers, HMOs, insurers, and others. [132] Protected health information under HIPPA includes:

> [A]ny information, whether oral or recorded in any form or medium, that— (A) is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.[133]

According to the Privacy Rule, protected health information may be disclosed in the following instances:

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[124] Wanda Ellen Wakefield, Annotation, *Physician-Patient Privilege As Extending to Patient's Medical or Hospital Records*, 10 A.L.R. 4th 552, 557 (1981).
[125] TREATISE, *supra* 116, at §16.02(3).
[126] *See* 42 U.S.C. §§ 1320d–1320d-8.
[127] The five objectives were "[1] to improve portability and continuity of health insurance coverage in the group and individual markets, [2] to combat waste, fraud, and abuse in health insurance and health care delivery, [3] to promote the use of medical savings accounts, [4] to improve access to long-term care services and coverage, [and] [5] to simplify the administration of health insurance[.]" HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996).
[128] *Id.*
[129] *See id.*
[130] HIPAA, Pub. L. No. 104-191, § 261.
[131] 45 C.F.R. §§ 164.500–534.
[132] 42 U.S.C. § 1320d(3).
[133] *Id.* § 1320d(4).

> (i) To the individual; (ii) For treatment, payment or health care operations . . . ; (iii) Incident to a use or disclosure otherwise permitted by this subpart . . . ; (iv) Pursuant to and in compliance with a valid authorization . . . ; (v) Pursuant to an agreement . . . ; and (vi) As permitted by and in compliance with this section[.][134]

Disclosure is also considered mandatory when the protected health information is requested by the individual to whom the information pertains and when required by the Health and Human Services Secretary.[135] In order to incur liability under HIPAA, a person must knowingly, and in violation of the HIPAA rules, do one or more of the following: 1) use or cause to be used a unique health identifier, 2) obtain individually identifiable health information relating to an individual, or 3) disclose individually identifiable health information to another person.[136] To date, only four cases have been prosecuted under HIPAA and none of those involved unauthorized disclosures of mental health records.[137]

2. *FERPA*

FERPA was enacted to provide parents with the right to review and inspect their children's educational records.[138] Any school receiving federal funding from the U.S. Department of Education is subject to the provisions in FERPA, meaning that all public elementary schools, secondary schools, and universities must comply.[139] The provisions in FERPA apply when student records are released to, among others, the student, the student's parent(s), professors, or any health care provider outside of the school.[140] When a student turns eighteen or attends any school beyond high school, the rights given to parents under FERPA transfer to that student, and he becomes an "eligible student."[141]

Schools are not under a legal obligation to release medical records created by campus health clinics unless certain requirements under FERPA

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[134] 45 C.F.R. § 164.502(a)(1).
[135] *Id.* § 164.502(a)(2).
[136] 42 U.S.C. § 1320d-6(a).
[137] The first case was prosecuted in 2004 against Richard Gibson, an employee of the Seattle Cancer Care Alliance, for accessing a patient's information and then obtaining credit cards in that patient's name. Gibson signed a plea agreement and was convicted and sentenced to sixteen months in prison. *See* Plea Agreement, United States v. Gibson, No. CR04-0374 RSM, 2004 WL 2237585 (W.D. Wash. 2004). The second case was prosecuted against Liz Ramirez, a Texas resident, in 2005 for the sale of an FBI agent's individually identified health information. Ramirez also entered into a plea agreement and was sentenced to six months in jail, four months of home confinement, and finally two years of probation. *See* Press Release, Federal Bureau of Investigation Houston Field Division, *Alamo Woman Convicted of Selling FBI Agent's Medical Records* (Mar. 7, 2006), *available at* http://houston.fbi.gov/dojpressrel/pressre106/ho030706usa.htm. The third and fourth cases were prosecuted for the theft and sale of individually identifiable health information. *See* Press Release, Federal Bureau of Investigation Miami Field Division, *Naples Man Convicted in Cleveland Clinic Identity Theft and Medicare Fraud Case* (Jan. 24, 2007), *available at* http://miami.fbi.gov/dojpressrel/pressrel07/mm20070124b.htm; Press Release, Federal Bureau of Investigation Little Rock Field Division, *Nurse Pleads Guilty to HIPAA Violation* (Apr. 15, 2008), *available at* http://littlerock.fbi.gov/dojpressrel/pressrel08/hipaaviol041508.htm.
[138] *See* U.S. Department of Education, Family Educational Rights and Privacy Act (FERPA), http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html.
[139] *See id.*
[140] 20 U.S.C. § 1232g.
[141] *Id.* § 1232g(d).

are met.[142] Those requirements dictate that the parent or eligible student must provide written, dated permission for the student's records to be released.[143] There are exceptions where a school can release records without written consent, including to school officials who have a "legitimate educational interest"[144] and in an emergency situation, if it is "necessary to protect the health or safety of the student or other persons."[145] FERPA does not apply to information such as personal observations or conversations that would not be in a student's record; therefore, teachers or administrators who witness strange behavior are free to report it to campus officials or law enforcement.[146]

Records developed while treating a student at a campus health center and that are not available to anyone outside of the person providing the treatment are covered by FERPA and, consequently, do not fall under HIPAA.[147] In fact, HIPAA excludes educational records from its definition of protected health information precisely because those records are covered by FERPA.[148] Finally, individuals cannot be prosecuted and students cannot sue under FERPA, but schools found in violation of FERPA can be subject to loss of federal funding.[149]

B. STATE MEDICAL RECORDS CONFIDENTIALITY STATUTES AND COMMON LAW LIABILITY

1. *Confidentiality Statutes*

Virtually all states have enacted statutes that require maintaining confidentiality in medical information and, specifically, mental health information.[150] The structure of most confidentiality statutes usually follows a basic blueprint of first, imposing a confidentiality requirement and second, providing for various exceptions where disclosure is acceptable.[151]

California's Confidentiality of Medical Information Act[152] ("CCMIA") provides an overview of what most state confidentiality statutes include. The CCMIA provides that "no provider of health care . . . shall disclose

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[142] *See* discussion *infra*.
[143] 20 U.S.C. § 1232g(b)(1).
[144] *Id.* § 1232g(b)(1)(A).
[145] *Id.* § 1232g(b)(1)(I). The other exceptions where release can occur without consent are: 1) to another school to which the student is transferring, 2) to specific officials for audit or evaluation purposes, 3) to appropriate parties involved with financial aid received by the student, 4) to an organization completing various studies for the school, 5) to school-accrediting organizations, 6) to comply with subpoenas or judicial orders, 7) to state and local authorities associated with the juvenile justice system. *Id.*
[146] *See generally* 20 U.S.C. § 1232g.
[147] *See* REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 66.
[148] 45 C.F.R. § 160.103 (definition of "protected health information"); U.S. Department of Education, FERPA, *supra* note 138.
[149] 20 U.S.C. § 1232g.
[150] *See, e.g.,* CAL. WELF. & INST. CODE §§ 5328–5329 (2008) (rights of involuntarily detained persons); CONN. GEN. STAT. §§ 52-146c–146g (2008) (evidence laws on disclosure for civil actions); FLA. STAT. § 394.4615 (2008); MICH. COMP. LAWS § 330.1748 (2008); N.Y. MENTAL HYG. LAW § 33.13 (Consol. 2008); OHIO REV. CODE ANN. § 5122.31 (West 2008); 50 PA. STAT. ANN. § 7111 (West 2008).
[151] *See* discussion *infra*.
[152] CAL. CIV. CODE § 56.10 (2008).

medical information regarding a patient of the provider . . . without first obtaining an authorization"[153] and then lists the approved exceptions where disclosure is allowed, including: pursuant to court order; in a proceeding before a court or administrative agency pursuant to a subpoena or subpoena duces tecum; to an arbitrator or arbitration panel; for purposes of diagnosis or treatment of the patient; to an insurer, employer, health care service plan, governmental authority where necessary for determination of payment; in connection with peer review and quality assurance activities; in connection with licensure or accreditation of the provider; and when otherwise specifically required by law.[154]

Third parties wanting to access confidential mental health records must overcome particularly strict statutory limitations, despite the existence of exceptions allowing third party access.[155] Legislation aimed at attempting to balance a patient's right to privacy and the interests of third parties in obtaining and using mental health records, has not successfully solved the problem and has often resulted in litigation.[156] Many statutes provide an exception allowing third parties to gain access, provided there is a legitimate reason for doing so, but other exceptions differ significantly among states.[157] In most jurisdictions, attorneys are allowed access to their client's records, but this access is linked to the client's right to access their own records.[158] Other parties commonly allowed to access confidential mental health records are additional treatment providers[159] or those using the information for research.[160]

Case law has established several alternative means for third parties to gain access to an individual's mental health records. Often, where there is no statutory right, courts will look to the interests of society in disclosing records and common law rights in granting access to third parties.[161] Insurance companies and government agencies that provide health care or regulate dangerous activities are often granted access to mental health records for a variety of valid reasons, such as conducting audits, preventing fraud, and making program evaluations.[162] Employers have been allowed access to records where there has been a valid, nondiscriminatory reason supporting the need for access.[163] Third parties, of course, are not always

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[153] *Id.* § 56.10(a).
[154] *Id.* § 56.10(b)–(c).
[155] TREATISE, *supra* note 116, at § 20.12(3).
[156] *See id.*
[157] *See, e.g.,* statutes cited *supra* note 150.
[158] *See, e.g.,* ARIZ. REV. STAT. § 36-509 (2008); CAL. WELF. & INST. CODE § 5328(j); FLA. STAT. § 394.4615(2)(b) (2008); MICH. COMP. LAWS § 330.1748(5)(c) (2008); N.J. STAT. ANN § 30:4-24.3 (West 2008).
[159] *See, e.g.,* CAL. WELF. & INST. CODE § 5328(a) (2008); CONN. GEN. STAT. § 52-146f(1) (2008); MICH. COMP. LAWS § 330.1748(6)(a) (2008); OHIO REV. CODE ANN. §§ 5122.31(A)(6), 5123.89(A)(3) (West 2008); 50 PA. STAT. ANN. § 7111(a)(1) (West 2008).
[160] *See, e.g.,* CAL. WELF. & INST. CODE §§ 5328(e), 5329 (2008); FLA. STAT. § 394.4615(4) (2008); MICH. COMP. LAWS § 330.1748(7)(b) (2008); N.Y. MENTAL HYG. LAW §§ 33.13(b), 33.13(c)(9)(iii) (Consol. 2008).
[161] *See* State v. Cribbs, 469 N.W.2d 108 (Neb. 1991) (holding that a lower court had the right to release mental health records of an insanity acquittee to a relative of the victim based on common law principals).
[162] *See* State Dep't of Social & Health Servs. v. Latta, 601 P.2d 520 (Wash. 1979) (en banc).
[163] *See*, *e.g.,* Vislisel v. Turnage, 930 F.2d 9 (8th Cir. 1991) (holding that an employer could require an individual applying for a job to submit to a psychiatric exam as part of the pre-employment screening

given access to mental health records since an individual's right to privacy often remains paramount.[164]

Theoretically, confidential information and records should only be released when the information is of such importance that society views its release as necessary to uphold the principals of justice or another important social value; however, the release of such records actually happens much more often as evidenced by the numerous statutory exceptions.[165] Liability for violations of medical confidentiality statutes vary across the nation and can even result in criminal charges in some states.[166] Other state statutes specify what civil actions a patient can take if his rights have been violated.[167]

2. *Privilege Statutes*

Statutes making communications between medical health care providers and patients privileged are also present in most states.[168] These statutes are usually found in the state's code of evidence since privilege is an evidentiary notion.[169] By invoking privilege, a medical health care provider can withhold information that could normally be compelled during court proceedings, thus preventing the information from being admitted into evidence.[170] The rationale supporting privilege is based on the idea that if physicians could be compelled to divulge the sensitive information shared by their patients in confidence, then the physician-patient relationship would suffer and patients might not seek or receive needed medical care.[171]

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process where the individual's strange behavior during an interview suggested he might have a mental issue); Devereaux v. Latham & Watkins, 38 Cal. Rptr. 2d 849 (Ct. App. 1995) (affirming the dismissal of an action brought by an employee against her employer for allegedly purposefully disclosing confidential mental health records regarding services she had received for mental disorders). *But see* Pettus v. Cole, 57 Cal Rptr. 2d 46 (Ct. App. 1996) (holding that two psychiatrists violated the privacy rights of an employee when they disclosed to the employer very sensitive medical information about the employee's drinking habits and stress without a written waiver).

[164] *See, e.g.,* Pettus, *supra* note 163 (overruling a lower court's order compelling a hospital to release the mental health records of two patients who were accused of raping another patient, because the release did not fall under the recognized statutory exceptions); Colorado Bd. of Nursing v. Bethesda Psychiatric Hosp., 809 P.2d 1051 (Colo. Ct. App. 1990) (holding that a state licensing board had no right to view a registered nurse's mental health records for disciplinary purposes because the records did not relate to her nursing conduct); *In re* Advisory Opinion No. 544, 511 A.2d 609 (N.J. 1986) (holding that a legal services project did not have to identify its clients with mental disabilities to the agencies providing the project with funding because the attorney-client privilege outweighed the rights of the agencies).

[165] *See* TREATISE, *supra* note 116, at §16.02.

[166] A willful violation of the provisions in the Tennessee Medical Records Act constitute a misdemeanor, punishable as provided by law. TENN. CODE ANN. § 68-11-311 (2008).

[167] *See, e.g.,* 740 ILL. COMP. STAT. ANN. 110/15 (West 2008) (The Illinois Mental Health and Developmental Disabilities Confidentiality Act provides: "Any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief. Reasonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act.").

[168] *See, e.g.,* CAL. EVID. CODE § 994 (2008).

[169] *See* TREATISE, *supra* note 116, at §16.02.

[170] *See* Schwartzberg v. Kai-Shun Li, 141 A.D.2d 530 (N.Y. App. Div. 1988).

[171] *See* Wakefield, *supra* note 124. *See also* Edelstein v. Dept. of Public Health & Addiction Services, 692 A.2d 803 (Conn. 1997) (privilege protects confidentiality and promotes the free exchange of information between physicians and patients); State v. Henneberry, 558 N.W.2d 708 (Iowa 1997) (privilege is meant to encourage free and full communication between patient and physician to allow for correct diagnosis and treatment); Maynard v. Heeren, 563 N.W.2d 830 (S.D. 1997) (privilege encourages open communication between doctors and patients).

The scope of the privilege depends, in part, on the medical health care provider involved in the communication and the applicable statutory language.[172] A patient's relationship with a doctor, psychiatrist, psychologist, social worker, or counselor (licensed or unlicensed) will determine the degree of privilege any communications between them are provided.[173] Most jurisdictions have statutes that prohibit physicians, a term which usually covers psychiatrists as well, from revealing information related to patient communications which were necessary for or part of the treatment process, but these statutes do not extend to other health care professionals.[174] A few states have statutes which address the psychiatrist-patient privilege specifically and provide for a broader privilege than that of the physician-patient, extending it to all communications regardless of whether they are part of the treatment.[175] The psychologist-patient privilege, which is addressed by statutes in about fifty-percent of jurisdictions, is similar in scope to the psychiatrist-patient privilege.[176] Where privilege has been extended to psychiatric records, the rationale is that the sensitive nature of a patient's mental health and behavior needs special safeguarding.[177] Some states have also extended privilege to social workers,[178] dentists,[179] nurses,[180] chiropractors,[181] rape counselors,[182] domestic violence counselors,[183] and violent crime counselors.[184]

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[172] Whether the communication between the patient and medical health professional is oral or written does not matter. *See, e.g.,* Tucson Medical Center Inc. v. Rowles, 520 P.2d 518 (Ariz. Ct. App. 1974); *In re* Coddington's Will, 120 N.E.2d 777 (N.Y. 1954). Privilege does not exist at common law, so where there is no privilege statute, courts will not find a privilege. State v. Locke, 502 N.W.2d 891 (Wis. Ct. App. 1993) (noting that in the search for truth, the evidentiary privilege hinders the court). *See also* D'Amico v. Delliquadri, 683 N.E.2d 814 (Ohio Ct. App. 1996); Benton v. Superior Court, 897 P.2d 1352 (Ariz. Ct. App. 1994); Stigliano by Stigliano v. Connaught Laboratories, Inc., 658 A.2d 715 (N.J. 1995); State v. Roper, 921 P.2d 322 (N.M. Ct. App. 1996).

[173] *See* discussion *infra*.

[174] *See, e.g., In re* Polen, 670 N.E.2d 572 (Ohio Ct. App. 1996) (chiropractors not covered by privilege); Buchanan v. Mayfield, 925 S.W.2d 135 (Tex. App. 1996) (dentists not covered by privilege); Robinson v. Meca, 214 A.D.2d 246 (N.Y. App. Div. 1995) (physician-patient privilege not applicable to records of optometrists); Waldron v. Ball Corp., 210 A.D.2d 611 (N.Y. App. Div. 1994) (only designated health care professionals covered by privilege); Med-Express, Inc. v. Tarpley, 629 So.2d 331 (La. 1993) (ambulance technicians, medical transport workers, and nurses not covered by privilege); State v. Tatro, 635 A.2d 1204 (Vt. 1993) (emergency medical rescue worker not covered by privilege); Commonwealth v. Rosenberg, 573 N.E.2d 949 (Mass. 1991) (conversations between defendant and therapist with doctorate degree in education not covered under psychotherapist-patient privilege); State v. Cahoon, 799 P.2d 1191 (Wash. Ct. App. 1990) (privilege not applicable to communications made to emergency medical technicians and paramedics); State v. McKinnon, 525 N.E.2d 821 (Ohio Ct. App. 1987) (medical technologist not covered by privilege).

[175] *See, e.g.,* ALA. CODE § 34-26-2 (2008); CONN. GEN. STAT. § 52-146d (2008); GA. CODE ANN. § 24-9-21(5) (West 2008); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (West 2008); MICH. COMP. LAWS § 330.1750 (2008); TENN. CODE ANN. § 24-1-207 (2008).

[176] *See, e.g.,* ALA. CODE § 34-26-2 (2008); CAL. EVID. CODE § 1014 (2008); CONN. GEN. STAT. § 52-146c (2008); FLA. STAT. § 90.503 (2008); MICH. COMP. LAWS § 330.1750 (2008); MINN. STAT. § 595.02 (2008) (witness testimonial limitations); N.Y. C.P.L.R. 4507 (psychologist), 4508 (social worker) (Consol. 2008); OHIO REV. CODE ANN. §§ 4732.19 (psychologist), 2317.02(B) (physician) (West 2008); PA. STAT. ANN. §§ 5944–45 (psychologist), 5929 (physician) (2008); VT. STAT. ANN. tit. 12 § 1612(a) (2008).

[177] *See* Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249-65 (1996).

[178] *See, e.g.,* NEV. REV. STAT. § 49.251 (2008); N.Y. C.P.L.R. 4508 (Consol. 2008); WISC. STAT. § 905.04 (2008).

[179] *See, e.g.,* NEV. REV. STAT. § 49.215(2) (2008); N.Y. C.P.L.R. 4504 (Consol. 2008).

[180] *See, e.g.,* N.Y. C.P.L.R. 4504 (Consol. 2008); WISC. STAT. § 905.04 (2008).

[181] *See, e.g.,* N.Y. C.P.L.R. 4504 (Consol. 2008); WISC. STAT. § 905.04 (2008).

Concerns over interference with the litigation process and the argument that patients will not avoid seeking medical treatment have led to several statutory limits and exceptions to the doctor-patient privilege.[185] However, these limits and exceptions often become more complicated when a patient has a mental health condition.[186] While patients have the option of waiving their rights to confidentiality, patients with mental health conditions are often incapable of making an informed decision regarding such a waiver.[187] However, if a patient puts their mental health at issue in the course of litigation, most courts are apt to find that there has been a valid waiver.[188] Courts in certain jurisdictions have discretion to pierce the veil and release privileged information in the interests of justice, but those interests must "significantly outweigh the need for confidentiality."[189] The interests of justice exception is applied primarily in criminal matters, but is occasionally used in the civil context as well.[190]

Another important exception to privilege comes from the duty established in *Tarasoff v. Regents of the University of California*,[191] which requires mental health professionals to protect or warn a readily identifiable potential third-party victim from being seriously harmed by a patient who has made credible threats about that person.[192] A therapist who divulges confidential patient communications to protect such a third party will not be held liable for this breach; rather, liability may be imposed if the therapist fails to take action.[193] This exception has caused concern among

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[182] *See, e.g.,* CAL. EVID. CODE § 1035.8 (2008); FLA. STAT. § 90.5035 (2008); 735 ILL. COMP. STAT. § 5/8-802.1 (2008); MASS. GEN. LAWS ch. 233, § 20J (2008); N.Y. C.P.L.R. 4510 (Consol. 2008).

[183] *See, e.g.,* CAL. EVID. CODE § 1037.5 (2008); FLA. STAT. § 90.5036 (2008); MASS. GEN. LAWS. ch. 233, § 20K (2008).

[184] *See, e.g.,* 735 ILL. COMP. STAT. § 5/8-802.2 (2008).

[185] *See, e.g.,* N.J. STAT. ANN. § 2A:84A-22.2 (2008); State v. Schreiber, 585 A.2d 945 (N.J. 1991) (holding that privilege did not apply where defendant tried to argue that the results of a blood test following an automobile accident which indicated she was intoxicated fell within the scope of the physician-patient privilege).

[186] *See* discussion *infra*.

[187] Note that privilege protects the patient's privacy, and therefore it is the patient's, not the physician's, privilege to waive. 81 AM. JUR. 2D *Witnesses* § 438 (1992). *See* People v. Bickham, 414 N.E.2d 37 (Ill. App. Ct. 1980), *aff'd*, 431 N.E.2d 365 (Ill. 1982).

[188] *See* Gray v. District Court, 884 P.2d 286 (Colo. 1994) (privilege waived where defendant in criminal case pled not guilty by reason of insanity and used an impaired mental condition as his defense); Wiles v. Wiles, 448 S.E.2d 681 (Ga. 1994) (privilege waived when party called psychologist as witness to testify about the party's mental condition); Owen v. Owen, 563 N.E.2d 605 (Ind. 1990) (privilege waived as to mental condition of wife in a child custody proceeding). *But see* Jordan v. Sinai Hosp. of Detroit, Inc., 429 N.W.2d 891 (Mich. Ct. App. 1988) (filing a lawsuit in itself does not automatically constitute waiving privilege).

[189] N.Y. MENTAL HYG. LAW § 33.13(c)(1) (2008). *See* D.C. v. S.A., 687 N.E.2d 1032 (Ill. 1997) (holding that defendant in wrongful death action did not have to disclose his mental health records where his mental health was not at issue and the records were not essential to plaintiff's case); McMaster v. Iowa Bd. of Psychology Examiners, 509 N.W.2d 754 (Iowa 1993), *cert. denied*, 62 U.S.L.W. 3805 (1994) (finding that plaintiff must disclose his mental health records where defendant claimed that plaintiff ran in front of his car while trying to commit suicide).

[190] *See, e.g., D.C.*, 687 N.E.2d 1032; *McMaster*, 509 N.W.2d 754.

[191] 551 P.2d 334 (Cal. 1976).

[192] *Id.* at 345 (noting that "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.").

[193] *See, e.g.,* Ms. B. v. Montgomery County Emergency Serv., Inc., 989 F.2d 488 (Table), No. 92-1682 (3d Cir. 1993) (holding that a hospital's disclosures were made in good faith and that the hospital could not be held liable, because the disclosure that an employee had threatened to shoot her supervisor and co-workers fell within the duty to protect third parties); Culberson v. Chapman, 496 N.W.2d 821 (Minn.

mental health professionals who worry that the protections guaranteed by privilege are being diminished by *Tarasoff* and its progeny.[194] They complain that being forced to testify at trial about the information they used to determine whether a third party required protection, effectively forces them to act as a witness against their clients and that this type of behavior harms the therapist-client relationship.[195] Courts have countered by explaining that once communications are disclosed to anyone, regardless of the reasons for disclosure, privilege is effectively waived.[196]

3. *Common Law Liability*

Where there has been a breach of confidentiality, patients have the option of bringing a legal action against the medical health care professional that wrongfully disclosed the information. The claims available to such a patient include invasion of privacy, breach of confidential relationship or betrayal of professional secret, breach of implied contract, defamation, negligence, and intentional infliction of emotional distress.[197]

The cause of action for invasion of privacy exists to protect a person's right to be left alone.[198] In order to establish a prima facie case for invasion of privacy, a plaintiff must prove the following elements: (1) the intrusion upon the plaintiff's physical solitude or seclusion; (2) the appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness; (3) the unreasonable public disclosure of private facts; and (4) publicity that unreasonably places the plaintiff in a false light before the public.[199] A plaintiff hoping to recover under this theory must show that the invasion of privacy would be highly offensive to a reasonable person and that the private facts were communicated to the public, as opposed to one or two people.[200] Where a patient's information is wrongfully disclosed in

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Ct. App. 1993) (holding that a chemical dependency counselor had not acted with malice and was immune from liability when the counselor disclosed to the current employer threats the client had made, even though the threats were directed at a previous employer); Rocca v. S. Hills Counseling Ctr., 671 N.E.2d 913 (Ind. Ct. App. 1996) (finding that even though the duty to protect third parties was not a statutory exception, a counseling center was not liable for disclosing a patient's death threats against the man accused of killing the patient's daughter, because common law and public policy supported the creation of such an exception by the courts); McCarty v. Kaiser-Hill Co., 15 P.3d 1122 (Colo. Ct. App. 2000) (holding that a psychologist that warned a patient's supervisors about threats the patient had made, instead of hospitalizing the patient, was not liable for the disclosure based on statutory authority).

[194] *See, e.g.,* Gregory B. Leong, Spencer Eth & J. Arturo Silva, *The Psychotherapist as Witness for the Prosecution: The Criminalization of* Tarasoff, 149 AM. J. PSYCHIATRY 1011 (1992).

[195] *See id.*

[196] *See, e.g.,* United States v. Snelenberger, 24 F.3d 799 (6th Cir. 1994) (finding that a therapist's testimony about defendant's threats against a judge were properly admitted under Michigan law, which imposes a duty to protect third parties); Vit v. State, 909 P.2d 953 (Wyo. 1996) (holding that where a defendant revealed in therapy that he was stalking and planning to kill an identifiable person, he had waived his privilege and could not stop his therapist from disclosing his statements during trial for violating the state's stalking laws).

[197] *See* discussion *infra*.

[198] *See* Tureen v. Equifax, Inc., 571 F.2d 411, 415 (8th Cir. 1978).

[199] RESTATEMENT, *supra* note 122, at § 652A.

[200] *Id.* at § 652A–D. *See* Chicarella v. Passant, 494 A.2d 1109, 1114 n.4 (Pa. Super. Ct. 1985). *See also* Mikel v. Abrams, 541 F. Supp. 591, 597 (W.D. Mo. 1982) (publicity was insufficient where the physician had communicated the private facts only to plaintiff's wife), *aff'd*, 716 F.2d 907 (Table), No. 82-1862 (8th Cir. 1983).

violation of independent legal and ethical duties, it is more likely that disclosure will constitute an invasion of privacy.[201]

Breach of confidential relationship or betrayal of professional secret actions can subject health professionals to civil liability when there is "unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship."[202] A cause of action alleging breach of implied contract suggests that professional ethical standards form an implied contract between physicians and patients.[203] Plaintiffs may bring a cause of action for defamation where a health provider releases false information that injures the reputation of the patient.[204] Negligence actions in the context of medical information privacy can arise where a health provider breached a legal duty of care to the patient and released confidential information.[205] Intentional infliction of emotional distress claims arise when improper disclosure is shown to be a "'wanton, voluntary or intentional wrong[,] the natural result of which is the causation of mental suffering and wounded feelings.'"[206]

C. THE VIRGINIA HEALTH RECORDS PRIVACY ACT

Access to medical records in Virginia is governed by the Virginia Health Records Privacy Act ("VHRPA"), which was first enacted in 1997.[207] VHRPA was recognized to protect an "individual's right of privacy in the content of his health records" and applies to medical providers, which broadly includes doctors, nurses, therapists, and billing entities.[208] The stringent limitation on the disclosure of a person's health records in VHRPA is qualified by various exceptions which allow for disclosure under certain circumstances.[209]

Health care entities may disclose medical records when there is written authorization from the individual, from a custodial parent or guardian, or in an emergency situation where it would be impractical to obtain written consent.[210] VHRPA also outlines an additional thirty-one other situations in which the disclosure of health records is acceptable, ranging from

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[201] *See* Hammonds v. Aetna Casualty & Surety Co., 243 F. Supp. 793 (N.D. Ohio 1965) (holding that a physician's disclosure of a patient's information constituted an invasion of privacy based on the confidentiality duties imposed by the Hippocratic Oath, a privilege statute, and professional licensing requirements).

[202] Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1455 (1982); Vassiliades v. Garfinckel's, 492 A.2d 580 (D.C. 1985) (finding that defendant physician breached the confidential relationship with plaintiff patient by posting "before" and "after" plastic surgery photographs of the plaintiff without her consent).

[203] *Hammonds*, 243 F. Supp. 793 (holding that the patient had the right to rely on the promise of discretion in the Hippocratic Oath).

[204] *See* TREATISE, *supra* note 116, at §16.02(3)(e).

[205] *See* Estate of Behringer v. Med. Ctr. at Princeton, 592 A.2d 1251 (N.J. Super. Ct. Law Div. 1991) (holding that hospital was negligent in failing to reasonably restrict access to a patient's medical records which showed the patient to be HIV-positive).

[206] Whitmire v. Woodbury, 267 S.E.2d 783, 785 (Ga. Ct. App. 1980), *rev'd on other grounds*, 271 S.E.2d 491 (Ga. 1980).

[207] VA. CODE ANN. § 32.1-127.1:03 (West 2008).

[208] *Id.*

[209] *Id.*

[210] *Id.* § 32.1-127.1:03(D)(1).

compliance with a subpoena to communicating "an individual's specific and immediate threat to cause serious bodily injury or death of an identified or readily identifiable person[.]"[211] While there are numerous situations where disclosure is acceptable under VHRPA, three basic types of disclosure are readily recognized: (1) "[r]equests made or approved by the person who is the subject of the records"; (2) when disclosure is necessary to ensure that medical treatment is effective; and (3) "[s]ituations where privacy is outweighed by certain other interests."[212] VHRPA does not contain exceptions for special access by parents or family members and actually limits access to patients or the patients' representatives.[213] Third party access to any medical records under this statute is extremely limited and is only approved without the patient's consent in four limited situations.[214] Virginia's laws in the area of medical records privacy are considered among the strictest in the nation.[215]

IV. PROBLEMS AND SOLUTIONS: PREVENTING SCHOOL SHOOTINGS BY INDIVIDUALS WITH MENTAL HEALTH ISSUES

A. CHANGING PRIVACY LAWS: BALANCING PRIVACY AND PUBLIC SAFETY

Currently, confusion as to what federal and state privacy laws allow regarding the disclosure of health records is widespread.[216] When teachers, administrators, or health care providers believe that a student may pose a danger to themselves or to others, they need to be able to share that information without fear of liability. The confusion as to when disclosure is permitted may serve to discourage those persons with the best knowledge about troubled students from sharing it, even where disclosure is acceptable. When privacy laws prohibit the disclosure of information that would alert a university about a mentally-troubled student, the chance to intervene and potentially prevent another school shooting is thwarted.

1. *Suggested Changes to Federal Laws*

The federal laws governing privacy greatly overlap for the purposes of this Note, as FERPA covers educational records and HIPAA, which specifically excludes educational records from its definition of protected health information, is similar to state confidentiality statutes. This overlap means that most of the suggested federal legislative changes will be directed at FERPA. The most important change would be to add a section

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[211] *Id.* § 32.1-127.1:03(D)(19).
[212] REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at 65.
[213] *See* VA. CODE ANN. § 32.1-127.1:03.
[214] The four situations are: "(1) to satisfy a subpoena; (2) upon request from a court-ordered attorney representing the patient in a civil commitment hearing; (3) for any judicial or administrative hearing if the patient is a juvenile who is the subject of that hearing and the court or judicial officer approves; and (4) where the patient has made a specific and immediate threat to cause serious bodily harm to a specific person." TREATISE, *supra* note 116, at §20.12(3)(a).
[215] *Id.*
[216] *Id.*

that explains when and how FERPA applies to medical records. A section should also be added to HIPAA that specifically states that FERPA covers educational records, rather than simply leaving educational records out of the definition of protected health information. As a result of the confusion that exists regarding when and under what laws disclosure is permitted, as much clarification as possible should be provided.

The exceptions in FERPA allowing for disclosure should also be clarified. The two exceptions which seem most applicable to situations where a student might pose a danger to themselves and others on a university campus are: 1) when there is a "legitimate educational interest[]"[217] and 2) in an emergency situation, if it is "necessary to protect the health or safety of the student or other persons."[218] Regarding the first exception, an amendment should be added that designates university personnel as having access to medical records for a legitimate educational purpose. School administrators, medical staff, law enforcement, mental health evaluators, and special hearing judges should all be allowed to access records under this exception. An amendment should be added to the second exception mentioned above, explaining exactly what constitutes an emergency, and one of those situations should be classified as a good faith belief that a student poses a danger to the general campus population. Again, this belief should be based on information in the student's records showing a cluster of red flag behavior and reports from faculty, staff, and other students. This exception should be flexible and allow for the variations that will occur from case-to-case to still qualify the situation as an emergency.

2. *Suggested Changes to State Statutes with an Emphasis on VHRPA*

While Virginia's medical records privacy laws clearly need to be amended in the wake of the Virginia Tech massacre, privacy laws in every state should also be evaluated and amended as applicable to help prevent school shootings from happening in any state. One problem is that the provisions in the medical records privacy statutes vary significantly from state to state and may cause confusion as to when disclosure is acceptable. VHRPA, which is recognized as one of the strictest medical records privacy statues in the country, should be amended to bring the statute more in line with the more moderate medical records privacy statutes enacted in other states.[219] State legislatures should also consider including a statutory provision which clarifies when, if ever, it is superseded by federal privacy laws. State lawmakers and attorney generals should further supply guidance as to when privacy laws are applicable to students with mental health problems. By providing university employees with literature and training that explains the laws in a clear and readily understandable

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[217] 20 U.S.C. §1232g(b)(1)(A).
[218] *Id.* §1232g(b)(1)(I). The other exceptions where release can occur without consent are: 1) to another school to which the student is transferring; 2) to specific officials for audit or evaluation purposes; 3) to appropriate parties involved with financial aid received by the student; 4) to organizations completing various studies for the school; 5) to school accrediting organizations; 6) to comply with subpoenas or judicial orders; 7) to state and local authorities associated with the juvenile justice system. *Id.*
[219] *See* TREATISE, *supra* note 116, at §20.12(3)(a).

manner, much of the uncertainty surrounding privacy laws could be alleviated.

Possibly the most important legislative change that should be made is to include a safe harbor provision to privacy statutes which would be applicable in situations where a student's mental health records are disclosed in the interests of protecting the health and welfare of the student and the university's general population. By shielding medical health providers and others with access to a student's mental health records from liability for good faith disclosures, the stigma surrounding the release of medical records would be diminished. A unique section should be dedicated to specifically allowing third-party access for universities with a good faith belief that a student might be a threat to themselves or others. Similar to the third-party access granted to employers, this section should clearly explain that access is only allowed where there is a valid, non-discriminatory reason for obtaining the records. This could help prevent litigation where a student is not accepted at a university for other reasons, but tries to claim that they were denied on the basis of mental health discrimination. Also, there are laws already in place that strictly prohibit discrimination against individuals with mental health problems,[220] so it is doubtful that a university would attempt to discriminate against a student in any case after viewing mental health records.

Having been recognized as one of the strictest privacy laws in the nation, VHRPA needs to undergo significant changes to allow for a better balance of privacy and public safety. In particular, parents and family should be allowed special access and disclosure rights regarding mental health records in certain clearly defined situations. An example of this type of situation would be where parents are concerned that their child has suicidal or homicidal tendencies and wish to alert the university where their child will be attending school. This access should not be arbitrarily granted in every situation, but had Cho's parents had access to their son's medical records, they might have been more concerned about his well-being and may have taken action to obtain help or treatment on his behalf.

Those opposed to amending privacy laws to allow for the disclosure of student mental health records will undoubtedly argue that this will diminish the privilege shared by patients and their medical health providers. Similar to *Tarasoff*,[221] once the records have been disclosed, it is possible that they could be discoverable in the course of future litigation. To avoid the loss of privilege in any and all future litigation, a qualification could be imposed limiting the loss of privilege to future cases directly involving crimes committed at or against the university that the student attends. If the student's mental health turns out to be at issue in connection with the commission of a crime while at a university, it logically follows that the mental health records the university had access to should be admissible in the related court proceedings. It is doubtful that students would avoid seeking help for their mental health issues out of fear that privilege could

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[220] *See generally* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12300 (2008).
[221] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

be lost in future litigation proceedings if the student's mental health records are disclosed during a university's admissions process.[222] Liability at common law should also be statutorily limited to encourage medical providers to disclose mental health records where universities have valid reasons for needing access to the records. Where the disclosure does not meet the statutorily imposed standards, the harmed person would retain his right to bring a common law tort or contract claim.

There are a significant number of changes to state privacy statutes that should be made to better balance an individual's right to privacy with that of the public's right to safety. The right to feel safe and to learn in a protected environment is paramount for students and the general population at universities. The current state of privacy laws in this country leaves little room for universities to discover the potential mental health problems of current or incoming students, and, as a result, there is little universities can do to protect other students, faculty, and staff from potential dangers posed by a mentally unstable individual. Universities need to be granted more leeway in this area so that they can provide the safest learning environment possible and maintain the reputation of being institutions free from violence where everyone is welcome to study.

B. VOLUNTARY CHANGES: WHAT SCHOOLS AND UNIVERSITIES CAN DO

There are a multitude of steps that schools and universities can take towards preventing school shootings by students with mental health issues without having to wait for the legislative process to institute privacy law changes. While all of the following suggestions would have to be voluntarily adopted by schools and universities, the cost-benefit analysis weighs heavily in favor of implementing the recommendations if it means avoiding another school shooting.

At the elementary and high school levels, less emphasis should be placed on getting troubled students to simply pass to the next grade level and more on actually helping the students work through their problems. For example, when a school encounters a student like Cho, the administration needs to offer therapy and counseling to help improve and resolve the student's issues instead of simply accommodating the student by granting him special privileges. The student's parent(s) should be contacted and involved with the process, and where the parents are not native English speakers, schools need to take steps to ensure that they fully understand their child's issues. Had this process been implemented with Cho's parents, they might have been more inclined to monitor their son on a regular basis at Virginia Tech, and could have recognized the signs that their son was becoming a danger to himself and to others. Schools should consider having frequent progress meetings with the student's parents and teachers so that the lines of communication remain open and everyone involved with the situation is fully aware of what is going on in all areas of the student's life.

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[222] *See* State v. Schreiber, 585 A.2d 945 (N.J. 1991).

Universities might consider requiring high school counselors to submit evaluations concerning how applicants interact with and relate to others. Where an evaluation causes concern, the university should follow up by interviewing both the applicant and the applicant's parents to fully assess the situation. If the university discovers, through this process, that an applicant may have mental health issues, the administration can then flag that student's file and make sure to monitor the student's progress and provide him or her with counseling and treatment options. Virginia Tech may have been alerted to Cho's communication problem by having Westfield's counselor fill out an evaluation. From there, the Virginia Tech admissions personnel could have met with Cho and his parents to gain information and assess the situation. While counseling and treatment programs do not offer an absolute guarantee that the student will not act violently at some point, it could certainly be helpful in some cases and could assist university personnel by making them aware of potential threats.[223] Providing Cho with counseling and medication while he was at Virginia Tech may have allowed him to better adjust to his new college lifestyle and would have alerted Virginia Tech personnel to Cho's mental health issues.

Universities may also want to consider requesting that such applicants voluntarily sign waivers after being admitted in order to allow the university to contact their parents if an issue arises. These waivers should include provisions or releases granting the university access to mental health records under specific circumstances, such as when the university has a good faith belief that the student poses a threat to themselves or to the health and welfare of other students, faculty, and staff. Precautions would need to be put into place in order to ensure that any invasion into the student's privacy is minimal and that information is not shared with those outside of the administration or agencies similar to Virginia Tech's Care Team.

Universities could also offer free mental health clinics in the dormitories on a monthly or bi-monthly basis to which troubled students could be referred. Students feeling depressed, anxious, or having any other multitude of problems would thereby have an invaluable free resource essentially at their fingertips to help alleviate those problems. Further, universities could form support groups for students that attend the free mental health clinics as a way to follow up with such students and ensure that their mental health does not further deteriorate.

Policies promoting communication between the various departments and agencies of a university must also be put into place. A master record should be compiled of a student's red flag behavior as recorded by each individual department and agency. This would allow the agency overseeing student welfare, similar to Virginia Tech's Care Team, to easily keep track of when a trend of red flag behavior develops. At that point, further steps can be taken to try and obtain the student's mental health records and to put

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[223] In almost three-fourths of cases evaluated for the Safe School Initiative Report, the individual planning the shooting told someone about their plan. *See Preventing School Shootings*, *supra* note 5, at 12.

a treatment plan into action. Case file risk factor analysis forms[224] should be included in such files and used as a tool to keep track of how much risk a student poses. If the departments at Virginia Tech had kept a master file for Cho, documenting his numerous problems, and had communicated regarding the issues each department and agency was experiencing, it is possible that the Care Team and administration would have intervened and taken more drastic measures to get Cho the help he required.

In an effort to encourage information sharing and communication between departments, universities should orchestrate meetings at least once per academic term where department heads and any concerned faculty or staff members can gather to share information about students raising concerns. All faculty and staff should be further educated as to what constitutes red flag behavior and what types of changes in a student's behavior should raise red flags.[225] Faculty and staff should be encouraged to report any suspect behavior since the accumulation of such behavior may indicate a more serious situation. Schools and universities should implement the above suggestions in an effort to create safer campuses and to address the mental health issues of their students.

C. CONCLUSION

Privacy is a cherished, protected right that Americans are reluctant to give up; but, if maintaining privacy for one person means putting the safety of others at risk, that should be enough to reevaluate and amend the privacy laws of this country. The lessons that should be taken from the Virginia Tech massacre are numerous and are lessons that must be taken seriously. Schools and universities need to work on not letting those students with mental health issues slip through the cracks and leave the school or university without receiving proper help. Universities need to make sure that their numerous departments are communicating effectively about students who may pose a danger to themselves or others. Privacy laws in the area of mental health records need to be revisited in order to allow educational institutions access when there is a good faith belief that a student may have mental health issues that might jeopardize a safe educational environment. Above all, clarification about the limits and boundaries of current federal and state privacy laws needs to be provided to those involved in the educational system.

Cho was a mentally unstable individual that committed an atrocity at Virginia Tech, but it might have been avoided had the university known about his condition and been able to take action to get him help. As of yet, VHRPA has not been amended to provide more exceptions for the disclosure of medical records[226] in cases similar to Cho's. More than a year has passed since the shooting at Virginia Tech, making this an issue that

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[224] For a sample form, see DR. JO CAMPBELL, ANTICIPATING AND MANAGING CRIME, CRISIS AND VIOLENCE IN OUR SCHOOLS 9-10 (2007).

[225] *See* REPORT OF THE VIRGINIA TECH REVIEW PANEL, *supra* note 13, at Appendix M.

[226] The last amendment to VHRPA was made in 2007. The amendment was not related to the Virginia Tech shooting and did not substantially change the overall reach and scheme of the statue. *See* VA. CODE §§ 32.1-127.1:03(D)(2), (D)(28)–(30).

should take precedence in the nation's schools and universities, in the federal government, and in all states with privacy laws that put public safety at risk.